

**Summary:** The plaintiff filed a motion to amend complaint for punitive damages against both defendants. The Court denied the plaintiff's motion finding that the City of Fairview, Montana is a municipality and is immune from punitive damages as is the defendant police officer in his official capacity. The Court also denied the plaintiff's motion as to the defendant police officer in his individual capacity finding that there is insufficient evidence to establish a factual basis to support a claim for punitive damages.

**Case Name:** Karst v. Bannon, et al.

**Case Number:** 4-07-cv-01

**Docket Number:** 43

**Date Filed:** 2/19/08

**Nature of Suit:** 360

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
NORTHWESTERN DIVISION**

Rusty Karst,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	<b>ORDER DENYING PLAINTIFF'S</b>
	)	<b>MOTION TO AMEND COMPLAINT</b>
	)	<b>FOR PUNITIVE DAMAGES</b>
Larry Bannon, individually and as a police	)	
officer, agent and an employee of the City	)	
of Fairview, Montana, and City of Fairview	)	Case No. 4:07-cv-001
Montana, a Municipal Corporation,	)	
	)	
Defendants.	)	

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Before the Court is the Plaintiff's "Motion to Amend Complaint for Punitive Damages" filed on January 11, 2008. The Plaintiff seeks leave to amend his complaint to add a claim for punitive damages, and requests a 45-60 day extension of time to amend the complaint to allow for additional discovery. The Defendants filed responses in opposition on January 25, 2008. On February 1, 2008, the Plaintiff filed a reply brief and requested oral argument. For the reasons set forth below, the

Plaintiff's motion to amend the complaint to add a claim for punitive damages is denied, the motion for an extension of time is granted, and the request for oral argument is denied as moot.

## **I. BACKGROUND**

This dispute arises from the traffic stop and arrest of the plaintiff, Rusty Karst. On March 1, 2006, defendant Lawrence Bannon, a police officer for the City of Fairview, Montana, pulled over a vehicle on suspicion of driving under the influence. Officer Bannon requested assistance in performing field sobriety tests and Officer Michael Downs of the Montana Highway Patrol responded. The events that unfolded were captured on the officers' patrol car video cameras.

The two officers' patrol cars were pulled over to the side of the road and Officer Downs conducted field sobriety tests on an unknown driver. Several vehicles passed by the patrol cars that evening without incident. The unknown driver was then placed under arrest shortly before Karst's vehicle arrived near the scene. As Karst's vehicle approached the officers' patrol cars, Officer Bannon seemed to be startled and he reacted by drawing his sidearm, pointed the gun at Karst's vehicle, and told Officer Downs and the unknown driver to look out. Officer Downs and the suspect who was being administered field sobriety tests moved in front of Officer Bannon's patrol vehicle, and Karst passed by the vehicles. The officers agreed to pursue Karst, and caught up to him shortly after he crossed into North Dakota at which time Karst pulled over to the side of the gravel road. Officer Bannon exited his vehicle and, with his gun drawn, slowly approached Karst's vehicle and yelled for Karst to get out. Karst remained in the vehicle. Officer Bannon then opened the door to Karst's vehicle and again ordered Karst to get out. Karst repeatedly yelled "For what?" See Docket Nos. 30 and 36.

Officer Downs was standing next to Officer Bannon at the door to Karst's vehicle. He was holding a flashlight and also repeatedly ordering Karst to get out of the vehicle. The videos reveal that Karst grabbed or swatted at Officer Downs' flashlight and swatted at Officer Bannon's face. In response to Karst's actions, Officer Bannon shot pepper spray into Karst's face. Officer Downs called for assistance from North Dakota authorities. Karst then decided to exit his vehicle and the confrontation escalated.

Karst repeatedly asked "What did I do wrong?" Officer Bannon yelled at Karst, "You damn near run us down." The verbal confrontation continued to escalate and Officer Bannon again sprayed Karst with pepper spray because he was uncooperative, profane, and resistive. Karst then yelled "What you gonna do about that? What you guys gonna do about that? I'm just goin' home. All's I did was go to the bar and go home. You guys wanna play, we'll play right now." Officer Bannon yelled back "Stay back, okay?" Karst continued to yell and curse and say "I'm gonna fuck you both up." Officer Bannon then went to his car and returned with a bean-bag gun. After additional yelling and screaming back and forth, Karst walked back towards his vehicle, got in, and drove away despite orders to the contrary from the officers.

The officers watched as Karst drove away. Karst ultimately ended up in the right-hand ditch of the gravel road a short distance away and when he was not being pursued by the officers. Officer Downs and Officer Bannon arrived and pulled forward to near Karst's vehicle. Officer Downs called in an update of the situation. While at this location, Deputy Sheriff Joseph Renders from the Richland County (Montana) Sheriff's Office arrived on the scene. Officer Bannon and Officer Downs exited their cars and stood on the gravel road discussing what to do while Karst remained in his pickup. Deputy Renders approached the vehicle, opened the door to Karst's vehicle, reached

in, and attempted to remove Karst from the vehicle. Officer Bannon was assisting in the efforts to remove Karst from the vehicle. Deputy Renders informed Karst that he was under arrest.

While attempting to extract Karst from his vehicle, one of the officers asked Karst “You got a gun?” Karst responded, “You don’t know what I got!” Karst continued to struggle with the officers while remaining in the vehicle. The video reveals that all three officers took a step back at which time Karst exited the vehicle and immediately pushed or shoved Deputy Renders up against the side of the vehicle. Officer Bannon then attempted to tackle Karst and Officer Downs used his baton to strike Karst in the left leg in an attempt to subdue him and get him off of Deputy Renders. After struggling with Karst at the side of the vehicle, the officers were finally able to subdue Karst and took him into custody. Karst was later convicted of the criminal offense of resisting arrest in North Dakota. See Docket No. 41.

On January 3, 2007, Karst filed this lawsuit against Lawrence Bannon, in his individual and official capacities, and the City of Fairview, Montana, alleging (1) assault and battery; (2) false arrest; and (3) a violation of constitutional rights under 42 U.S.C. § 1983. See Docket No. 1. On January 11, 2007, Karst sought leave to amend the complaint to include a claim for punitive damages, and for additional time to amend the complaint to determine if there is a claim against the City of Fairview for negligent hiring, training, and supervision of Officer Bannon.

## **II. LEGAL DISCUSSION**

Karst seeks to amend the complaint to include a claim for punitive damages against both defendants Larry Bannon and the City of Fairview under Section 32-03.2-11(1) of the North Dakota Century Code and 42 U.S.C. § 1983.

**A. THE CITY OF FAIRVIEW**

Karst argues that good cause exists to add a claim for punitive damages against the City of Fairview. The Defendant contends that the City of Fairview is a municipal corporation and is immune from punitive damages.

Section 32-12.1-03(2) of the North Dakota Century Code provides that “A political subdivision may not be held, or be ordered to indemnify an employee held liable, for punitive or exemplary damages.” Karst has cited no authority to refute Section 32-12.1-03(2) nor cited any authority which holds that a municipality may be held liable for punitive damages under North Dakota law. The Court finds that the City of Fairview, Montana is a municipal corporation and is clearly immune from punitive damages for the state law claims asserted in the complaint.

With respect to Karst’s request for punitive damages against the City of Fairview for the alleged civil rights violations under 42 U.S.C. § 1983, the United States Supreme Court has clearly held that a municipality is immune from punitive damages under 42 U.S.C. § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). The Supreme Court expressly stated that allowing punitive damages against a municipal corporation is “contrary to sound public policy, because such awards burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.” Id. at 263.

Karst argues that the United States Supreme Court qualified that decision in Smith v. Wade, 461 U.S. 30 (1983), by holding that punitive damages are allowed when the “defendant’s conduct involves a reckless or callous indifference to the federally protected rights of others.” Id. at 56. However, the Supreme Court in Smith was referring to non-municipal defendants and that decision does nothing to qualify the Supreme Court’s holding in City of Newport. In fact, the Supreme Court

in Smith cited to the City of Newport decision for the holding that “a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under § 1983.” Smith, 461 U.S. at 35, n.5 (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981)). Similarly, the Eighth Circuit has held that a municipality may not be held liable for punitive damages. Fields v. City of Omaha, 810 F.2d 830, 835 (8th Cir. 1987). The Court finds, as a matter of law, that the City of Fairview is immune from punitive damages for the civil rights claims asserted under 42 U.S.C. § 1983.

**B. OFFICER BANNON**

**1) OFFICIAL CAPACITY**

Karst seeks leave to amend the complaint to include a claim for punitive damages against Officer Bannon in his individual and official capacities. It is well-established that punitive damages cannot be recovered from defendants in their official capacities. Gregory v. Chehi, 843 F.2d 111, 120 (3rd Cir. 1988); Colvin v. McDougall, 62 F.3d 1316, 1317 (11th Cir. 1995). Official capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” Monell v. New York City Dep’t of Social Servs., 436 U.S. 658, 690 n.55 (1978). “As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against an entity.” Kentucky v. Graham, 473 U.S. 159, 166 (1985). Therefore, claims against defendants in their official capacities are duplications of counts asserted against the municipal corporation itself. Gregory, 843 F.2d at 120.

The Court finds that a punitive damage claim against Officer Bannon in his official capacity is the same as a suit against the City of Fairview. Therefore, the Court finds, as a matter of law, that Officer Bannon, in his official capacity, is immune from a claim for punitive damages.

## **2) INDIVIDUAL CAPACITY**

Officer Bannon contends that Karst's conviction in North Dakota on the charge of resisting arrest collaterally estopps Karst's claim for punitive damages in this civil rights action. See Docket No. 41. "[T]he modern rule, as expressed in the Restatement 2d, Judgments, is to accord judgments in criminal proceedings collateral estoppel effect, i.e. to preclude relitigation of any issues necessarily and actually decided therein in later civil proceedings, similar to that of judgments in civil cases, at least with respect to judgments for the prosecuting authority. . . ." Ohio Cas. Ins. Co. v. Clark, 583 N.W.2d 377, 382 (N.D. 1998) (citing 47 Am. Jur. 2d, Judgments § 732 (1995)).

It is well-established in the Eighth Circuit that the application of res judicata principles in a diversity action is a question of substantive law controlled by state common law. Lane v. Sullivan, 900 F.2d 1247, 1250 (8th Cir. 1990); Hillary v. Trans World Airlines, 123 F.3d 1041 (8th Cir. 1997); see D'Amario v. Butler Hosp., 921 F.2d 8, 10 (1st Cir. 1990) (providing that the res judicata effect of a state judgment is governed by state law). Collateral estoppel, or issue preclusion, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Stoebner v. Parry, Murray, Ward & Moxley, 91 F.3d 1091, 1094 (8th Cir. 1996); see Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992) (collateral estoppel "generally forecloses the relitigation, in a second action based on a different claim, of particular issues of either fact or law

which were, or by logical and necessary implication must have been, litigated and determined in the prior suit”). Before collateral estoppel will bar relitigation of a fact or issue involved in an earlier lawsuit, four tests must be met:

(1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id.

The Court finds that the issues decided in Karst’s state criminal case and his resulting conviction are not identical to the issue(s) presented here. The record is devoid of the details of Karst’s criminal conviction for resisting arrest. The Court finds that the evidence in the record does not support the collateral estoppel of Karst’s motion to amend the complaint to add a claim for punitive damages. The Court will next consider whether Karst is entitled to amend his complaint to pursue a claim for punitive damages against Officer Bannon in his individual capacity.

**a. STATE LAW CLAIM FOR PUNITIVE DAMAGES**

To be entitled to amend the complaint to request a claim for punitive damages under North Dakota law, Karst must establish a factual and legal basis to pursue such a claim by showing that there are facts from which the fact finder could conclude that there is “oppression, fraud, or actual malice.” Olson v. Ford Motor Co., 2005 WL 3271945, \*1 (D.N.D. November 29, 2005); Lowell v. Zurich Ins. Co., 1992 WL 212233, \*2 (D.N.D. August 20, 1992). At this point, Karst is not required to prove an entitlement to punitive damages by clear and convincing evidence, which is the requisite burden of proof at trial.



Section 32-03.2-11(1) of the North Dakota Century Code provides as follows:

In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

N.D.C.C. § 32-03.2-11(1). This statute provides a substantive right and applies to this action. See Myers v. Richland County, 288 F. Supp. 2d 1013, 1021 (D.N.D. 2003) (“Exemplary damages statutes provide a substantive right and therefore state law applies.”).

Karst contends that the requisite evidence of oppression, fraud, or actual malice has been established for purposes of North Dakota law. The term “oppression” means “subjecting a person to cruel and unjust hardship in conscious disregard of that person’s rights.” See North Dakota Pattern Jury Instructions C-72.10; see also Ingalls v. Paul Revere Life Ins. Co., 561 N.W.2d 273, 284-85 (N.D. 1997); Harwood State Bank v. Charon, 466 N.W.2d 601 (N.D. 1991); Napoleon Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346, 359 (N.D. 1987). “Actual malice” is defined as “an intent with ill will or wrongful motive to harass, annoy, or injure another person.” See North Dakota Pattern Jury Instructions C-72.16; see also Ingalls v. Paul Revere Life Ins. Group, 561

N.W.2d 273 (N.D. 1997); McLean v. Kirby Co., 490 N.W.2d 229 (N.D. 1992); Stoner v. Nash Finch, Inc., 446 N.W.2d 747 (N.D. 1989).

Actual malice is the actual state or condition of the mind of the person who did the act. Direct evidence of actual malice is not required. Rather, the character of the act itself, with its surrounding facts and circumstances, may be inquired into for the purpose of ascertaining the motive or purpose which influenced the mind of the party in committing the act. Thus, upon the consideration of these, if that motive is found to be improper and unjustifiable, the law authorizes the jury to find it was malicious.

Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 754 (N.D. 1989).

At this stage of the proceedings, the Court must determine whether Karst has shown that there is a factual basis to support a claim of punitive damages. In other words, is there sufficient evidence presented to support a finding by the trier of fact that a preponderance of the evidence establishes oppression or actual malice on the part of Officer Bannon. In support of the request for punitive damages, Karst has alleged that Officer Bannon repeatedly sprayed Karst with pepper spray. Karst also contends that he was physically removed from his vehicle and hit with a baton after Officer Bannon represented to the other officers that Karst had tried to run over Officers Bannon and Officer Downs. In further support of a finding that Officer Bannon acted with oppression or actual malice, Karst relies upon the officers' patrol car video camera recordings of the incident. Karst contends that the videotapes do not support Officer Bannon's contention that Karst tried to run over the officers.<sup>1</sup>

The record reveals that at the time Officer Downs and Officer Bannon first stopped Karst, Officer Bannon was responding to what he contends was an attempt by Karst to "run down" Officer

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<sup>1</sup> The Court would note that the videotapes clearly reveal that Officer Michael Downs of the Montana Highway Patrol and Richland County Deputy Sheriff Joseph Renders conducted themselves in a courteous, respectful, and professional manner in their dealings with Rusty Karst the evening of March 1, 2006.

Downs and Officer Bannon on the highway. The videotapes clearly reveal that Karst was belligerent, obstructive, abusive, and profane. He repeatedly refused to comply with the officers' orders. The record reveals that Officer Bannon sprayed Karst with pepper spray on several occasions after Karst refused to comply with any of the officers' orders and while Karst was belligerent and resistive to any efforts to subdue him. Later during the confrontation, Karst was struck in the left knee area with a baton wielded by Highway Patrol Officer Downs - but only after Karst had exited his vehicle and proceeded to immediately push or shove Richland County Deputy Renders and then pin Officer Renders up against the vehicle.

After a careful review of the entire record and all of the videotapes, the Court finds that there is insufficient evidence to prove that the alleged assault and false arrest of Karst by Officer Bannon were committed with oppression or actual malice as those terms are defined under North Dakota law. The facts and circumstances concerning Officer Bannon's actions towards Karst are insufficient for the Court to find at this stage that Karst has established a factual basis to support a claim for punitive damages against Officer Bannon.

The Court finds, as a matter of law, that Karst has submitted insufficient evidence to support a factual basis for a claim of punitive damages against Officer Bannon as to the claims asserted under state law. Simply stated, there is insufficient evidence presented to support a finding by the trier of fact that a preponderance of the evidence establishes oppression or actual malice on the part of Officer Bannon.

**b. PUNITIVE DAMAGES UNDER 42 U.S.C. § 1983**

Whether punitive damages are available under 42 U.S.C. § 1983 rests on the intent of the defendant. Coleman v. Rahija, 114 F.3d 778, 787 (8th Cir. 1997). Punitive damages are available “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” Coleman, 114 F.3d at 787; Smith v. Wade, 461 U.S. 30, 56 (1983). The conduct of Officer Bannon was certainly unprofessional but the Court finds that Karst has presented insufficient evidence to support a finding by the trier of fact that a preponderance of the evidence establishes reckless or callous indifference to Karst’s federally protected rights.

### **III. CONCLUSION**

For the reasons set forth above, the Court finds that the plaintiff, Rusty Karst, is precluded from seeking an award of punitive damages against the City of Fairview and against Officer Bannon in his official capacity. The Court further finds that the record contains insufficient evidence of oppression or actual malice on the part of Officer Bannon to allow Karst to amend the complaint to allege a claim for punitive damages against Officer Bannon in his individual capacity. The Plaintiffs’ Motion to Amend Complaint for Punitive Damages is **DENIED**. (Docket No. 24). The deadline for seeking leave to amend the pleadings is extended until March 31, 2008. The Court **DENIES** as moot the Plaintiff’s Motion for Hearing. (Docket No. 42).

**IT IS SO ORDERED.**

Dated this 19th day of February, 2008.

/s/ Daniel L. Hovland  
Daniel L. Hovland, Chief Judge  
United States District Court